(1)

Supreme Court, U.S.
FILED

No. 97-588 JUL 28 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

IRA VAN HARRIS,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

FRANK A. DELLE DONNE
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38 pp

QUESTIONS PRESENTED FOR REVIEW

First Question

Whether the Supreme Court of New Jersey erred in not reversing a conviction where the trier of fact made the finding of guilt seven days before it made the critical credibility finding.

Second Question

Whether the Supreme Court of New Jersey erred in not reversing a conviction where the record could not reasonably support a finding of guilt.

PARTIES TO THIS PROCEEDING

All parties are listed on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ira Van Harris, respectfully prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court decided April 29, 1997.

OPINIONS BELOW

The judgment of the New Jersey Supreme Court is not reported, but is reprinted in Appendix at A-7.

The unreported judgement of the Superior Court of New Jersey, Appellate Division, is reprinted in Appendix at A-4 and A-6.

The opinion of the Superior Court of New Jersey, Law Division is unreported, but is reprinted in Appendix at A-8 to A-12.

The opinion of the Municipal Court of Seaside Heights, New Jersey is unreported, but the relevant portions are reprinted herein where applicable.

JURISDICTION

The judgement of the New Jersey Supreme Court for which review is sought is dated April 29, 1997. This petition is filed within 90 days and is timely under Rule 13 of the Rules of the Supreme Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND RULES INVOLVED

This case involves New Jersey statutes N.J.S.A. 2C:29-2 and N.J.S.A. 2C:33-2, reprinted in the Appendix. (A-17, 18)

This case also involves New Jersey Court Rule R. 3:23-8(a) and R. 2:5-1(b), reprinted in the Appendix. (A-14, 13)

STATEMENT OF THE CASE

On July 29, 1995, petitioner, Ira Van Harris, was charged with disorderly conduct and resisting arrest for allegedly violating N.J.S.A. 2C:33-2(a) and 2C:29-2. (A-17,18). On November 16, 1995, petitioner's trial of first instance was held in the Municipal Court of Seaside Heights, New Jersey. Petitioner was convicted of both counts. At the Municipal Court trial, the following relevant facts were deduced from the testimony of Officer John Flaherty, petitioner Ira Van Harris, and Matthew Ivanicki- an eyewitness. The State's only witness, Officer John Flaherty, testified as follows:

1. That on the evening of July 29, 1995, Officer Flaherty, while standing in front of the Bermuda Club at closing, witnessed petitioner being ejected from the bar by three bouncers (T-12);

2. That Officer Flaherty walked to the door because petitioner was knocking on the door while the bouncers were holding it closed (T-13);

3. That Officer Flaherty approached petitioner because he thought that petitioner may have been the victim of an assault or theft (T-28);

4. That petitioner pushed him out of the way to get back into the bar, resisted arrest the whole way back to the car, and that the OC spray was needed to allow the three police officers to restrain petitioner and cuff him (T-19 to T-33);

5. Officer Flaherty testified in response to defense examination that after he put petitioner in the car, five minutes had elapsed and he went back into the bar door to find the

bouncers to ascertain what had happened regarding a possible assault or theft against petitioner, but when he got back to the bar, he saw some people there, but the bouncers were gone (T-19 to T-33);

6. Officer Flaherty did not try to ask anyone any questions to ascertain what had happened with the possible assault or theft on petitioner, but simply looked in the bar, saw people there- not the bouncers- and left (T-19 to T-33);

7. Officer Flaherty testified that he never further investigated what had actually happened in the bar because petitioner never filed a complaint against anyone in the bar so he assumed that there was no problem as he previously may have thought (T-109).

Petitioner and Mr. Ivanicki, a witness to the events, testified that petitioner did nothing wrong and when petitioner was asked to walk away from the bar, petitioner simply turned to another friend to ask him to please go back inside and get his hat at which time the officer said "that is it" and arrested Mr. Harris. After hand cuffs were placed on Mr. Harris and Mr. Harris was being placed peacefully into the police car, another Officer ran across the street and sprayed Mr. Harris with OC spray.

During the Municipal Court trial, the following exchange took place while the prosecution was cross examining Mr. Ivanicki: (T-73 to T-75)

> PROSECUTOR: Okay. Now let me ask you, did either you – after observing this did you take any action, either on your own behalf or on Mr. Harris' behalf, or did Mr. Harris take any action and file any type of charges or internal complaints against the officers that were involved in this–

DEFENSE: Objection Your Honor, that has no – no bearing on anything. It doesn't have any relevance to anything whether or not he decided to file charges, it's – just completely irrelevant–

PROSECUTOR: No, it's ,–

DEFENSE: It's completely irrelevant and if I just may finish, Your Honor. It's just– the prejudices like that outweigh the benefit. Whether or not he's going to file a civil charges is irrelevant . .

THE COURT: No, I'm going to overrule your objection. It goes to his credibility. He's saying that this was such a shocking conduct by the officers, I think it's relevant as to whether he took action or he didn't. The fact that he did or he didn't, he may not have an explanation for that. So I'll allow the question.

PROSECUTOR: Did either you take action to press charges or to file a report against any of the officers that were involved in this particular incident ?

MR. IVANICKI: No.

PROSECUTOR: Okay, do you know if Mr. Harris has?

MR. IVANICKI: No, because right now he's trying to get through whatever it is.

The Municipal Court convicted petitioner on both counts and ruled in part as follows:

THE COURT: This comes down to stories that

are completely divergent in this matter. It comes down to a matter of credibility and I have to determine this case on credibility that can be drawn from the facts as we know them. (T-107)

. . . .

THE COURT: Counsel seems to make much of the fact that the officer testified that there was no further investigation. That he went up to the door to see if he could get a statement from the bouncers and that the bouncers weren't there.

I don't know that that signifies anything. He's got a person who's handcuffed in the back seat who had been maced that they wanted to get back to headquarters. The officer went up to see if the bouncers were there, they were not at the door area. He indicated that he went into the foyer, didn't see the bouncers and then took Mr. Harris back to the station.

That he assumed that if Mr. Harris wanted to file complaints against the officers, Mr. Harris would have made mention of that which he did not, against the bouncers rather. Mr. Harris made no complaints against the bouncers. That if the bouncers wished to make complaints against Mr. Harris that they would have appeared at headquarters to make such a complaint.

No bouncers came down, no one made any subsequent complaints against Mr. Harris and therefore he felt no need to do any further investigation. (T-109)

Petitioner appealed these convictions to the Superior Court of New Jersey pursuant to New Jersey R. 3:23-8(a). (A-14)

New Jersey conducts a trial de novo on the municipal court record. The de novo court considers the matter completely anew technically acting as a court of first instance making new findings with a cold record giving due although not necessarily controlling regard of the municipal court's opportunity to view the witnesses.

At the trial de novo, defense counsel objected to the municipal court allowing into evidence petitioner's post arrest silence as well as pointing out the plain inconsistencies in Officer Flaherty's testimony. The de novo court, also stating that witness credibility is the central issue, ruled in part as follows:

> THE COURT: [I]'ve heard dozens of cases where not only where there are inconsistencies stated, but where a witness, sometimes an Officer, has stretched the truth on a particular issue, but where the Court is still basically satisfied, based upon a reading of all the testimony, and hearing all the testimony, that the substance of the charges were truthfully testified to. And unfortunately for you and your client, that's the conclusion that I reached here. (A-9)
>
> . . .
>
> THE COURT: The Court should grant, irrespective of, and I should say, totally aside from anything that the Judge had to say with regard to Complaints being filed or not being filed, that, I agree with you, that doesn't cut any mustard, so far as I'm concerned, but he did have the opportunity to view, as this Court did not, the testimony given by all parties. And I'm entitled to and really bound to give that testimony deference under the case State

> versus Johnson, which has been law in this state for up to 25 or 30 years. (A-11)

Petitioner was convicted of both counts at the trial de novo which was held on January 31, 1996. (A-12) On February 6, 1996, the de novo court submitted a "new" credibility finding pursuant to R. 2:5-1(b). (A-13) The amplification letter states:

> As indicated at the trial de novo, credibility was central to the Court's decision. The law provides that this Court must give deference to the municipal court judge's conclusions in that regard, since he was in the best position to observe the demeanor of the witnesses as they testified. Notwithstanding this axiom of review, this Court finds ample evidence on the record which would independently support the lower court's conclusion regarding credibility. (A-2 to A-3).
>
> While this court recognizes, as defendant alleges, certain inconsistencies in Patrolman Flaherty's testimony . . . One can hardly find it believable that three police officers, surrounded by dozens of bar-goers, would treat the defendant as testified to by the defense witnesses, handcuff him, and then assault him with a chemical spray, in full view of a crowd which would be expected to become hostile on the occurrence of such events. (A-3)

Petitioner appealed to the Appellate Division arguing that (1) the de novo court erred by first deferring to the municipal court on the issue of witness credibility when the municipal court Judge assessed the credibility on evidence inadmissible under the defendant's right to remain silent; and (2) that the de

novo court abused its discretion in determining that Officer Flaherty's testimony was more credible than the defense case. Petitioner also argued that a "new", post mortem credibility finding after a conviction violates due process rights; and that the de novo court's amplification letter stating that "the crowd would be expected to become hostile", thereby finding petitioner's testimony incredible and Officer Flaherty's testimony credible, was improper because there were no facts in the record tending to prove or disprove the inference of whether the crowd became hostile. Nor was there any evidence in the record to determine how Officers would expect a crowd to act if they witness a police brutality event.

The Appellate Division affirmed the judgement with no written opinion. (A-4 to A-5). Petitioner filed a motion for reconsideration which was denied on January 10, 1997. (A-6) Petitioner filed for review in the New Jersey Supreme Court which was denied on April 29, 1997. (A-7)

Petitioner now respectfully requests that the Supreme Court of the United States grant a writ of certiorari so this Court may exercise its appellate and supervisory authority.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF NEW JERSEY ERRED IN NOT REVERSING THE CONVICTIONS BECAUSE THE TRIER OF FACT MADE THE FINDING OF GUILT SEVEN DAYS BEFORE MAKING THE CRITICAL CREDIBILITY FINDING.

The Municipal Court Judge improperly found witness credibility based on the fact that petitioner remained silent and did not file complaints against the bouncers or officers thereby tying Officer Flaherty's story together and discrediting the defense witness and petitioner for not filing complaints for such alleged brutal conduct. *Page 3-4, Supra.* The de novo

court in convicting petitioner, although properly excluding evidence regarding petitioner not filing complaints and remaining silent, improperly grounded the conviction on the municipal court judges opportunity to view the witnesses' credibility. (A-10, 11) It was not until seven days after the finding of guilt that the de novo court made the new, independent, critical credibility finding. (A-3) Petitioner contends that his due process rights have been violated in allowing a de novo court to make a credibility finding based on admittedly inadmissable evidence, then make the "new" critical credibility finding seven days after the de novo court was already convinced that petitioner was guilty beyond a reasonable doubt. (A-2, 3)

A. The de novo court violated petitioner's Fourteenth Amendment Due Process rights by rendering a post mortem critical credibility finding seven days after it had found petitioner guilty. The Due Process Clause of the Fourteenth Amendment requires that a defendant be tried before a disinterested and impartial judicial officer. Ward v. Village of Monroe, 409 U.S. 57 (1972), 93 S.Ct. 80. In Ward, the Court found a Due Process violation where a mayor sits as judge imposing convictions and fines that fund the village because a presumption of bias exists. Similarly in Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927), the Court found that Due Process is violated where a Judges salary is based on a percentage of the fines he imposes for convictions because a presumption of bias exists. Id. Such structural procedural defects are presumed to be prejudicial. Arizona v. Fulminante, 111 S.Ct. 1246, 1265, 499 U.S. 309 (1991). "A defendant charged with a crime is entitled to an unbiased jury and is entitled to a presumption of innocence until such time as he is proven guilty beyond a reasonable doubt." Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992). Trying a defendant before a biased trier of fact is the same as providing him no trial at all. Id. at 755.

The rule that exists from this line of decisions is that due process and the right to a fair trial is violated if a judge or trier of fact is implicitly biased towards the case or towards the defendant.

In the case at bar, the de novo court violated petitioner's Fourteenth Amendment Due Process rights. The de novo court agreed with petitioner that his post arrest silence (not filing complaints) was inadmissible. (A-11) However, the de novo court erred in initially deferring to the municipal court's improper credibility assessment because the de novo court cannot rely on a municipal court finding that stands on evidence the de novo court excludes. (A-11) Presumably realizing this seven days after the de novo court found petitioner guilty, the de novo court issued an amplification letter finding new and independent grounds for credibility. (A-2 to A-3). Petitioner contends that this violates his Due Process and Fair Trial rights because the de novo court made the critical credibility finding seven days after the de novo court was already convinced that petitioner was guilty beyond a reasonable doubt. In other words, just as in Tumey and Ward, the de novo judge was presumptively biased against petitioner because His Honor made the critical credibility finding seven days after being convinced beyond a reasonable doubt that petitioner was guilty of these crimes. Petitioner contends that Due Process requires the critical credibility finding to be made before the judgement of guilt for process to proceed in a logical, reasonable manner. A finding of guilt and a post mortem critical credibility finding is not reasonably or logically permissible for these convictions to be reliable.

Moreover, had the de novo court properly excluded the entire municipal court's credibility finding at the time of the de novo trial, the testimony in the record may have made different impressions to the de novo court as the testimony was being presented. The new and independent critical

credibility findings cannot be used because due process reasonably requires that the critical credibility finding be made before the judgment of guilt is entered.

B. Nor can the initial deference to the municipal court's credibility finding be used. (A-11). The de novo court properly excluded evidence regarding petitioner's post arrest silence in not filing complaints or complaining against the bouncers or police officers. "Silence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights." Doyle v. Ohio, 426 U.S. 610, 617 (1976), 96 S.Ct. 2240.

> Miranda warnings contain an implicit assurance that silence will carry no penalty and it does not comport with due process to permit the prosecution during the trial to call attention to the defendant's silence at the time of the arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. Greer v. Miller, 483 U.S. 756, 762 (1987), 107 S.Ct. 3102, 3107, citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245.

Whether the defendant decides to testify or not, post arrest silence allowed into evidence violates the Due Process Clause of the Fourteenth Amendment. Greer v. Miller, 107 S.Ct. at 3107, 483 U.S. at 763, citing Doyle v. Ohio, 426 U.S at 619, 96 S.Ct. at 2245.

In the case at bar, the de novo court erred in first deferring to the municipal court's credibility finding because the municipal court used the petitioner's silence, in not complaining against the bouncers or the officers for brutality,

to establish which testimony would be considered credible and to compel the defense witnesses to procure an explanation as to why complaints were not filed. *See pages 3-5, supra.*

The de novo court agreed with petitioner's assertion at the trial de novo that post arrest silence should not have been used to determine credibility or for any other purpose. (A-11) As the municipal court's credibility findings were derived from irrelevant evidence that deprive petitioner his right to remain silent, the de novo court's initial credibility determination deferring to the municipal court's credibility determination, cannot be used to replace the de novo court's post mortem credibility findings in the amplification letter. (A-2 to A-3). Petitioner contends that his due process rights and his rights to a fair trial and fair direct appeal have been violated with either set of credibility findings. Petitioner respectfully requests that a writ of certiorari be granted so this Court may exercise its appellate and supervisory authority.

II. THE SUPREME COURT OF NEW JERSEY ERRED IN NOT REVERSING THE CONVICTION WHERE THE RECORD COULD NOT REASONABLY SUPPORT A FINDING OF GUILT.

There are so many flagrant inconsistencies and discrepancies in Officer Flaherty's testimony that it is unreasonable to find that a trier of fact could conclude that his testimony is credible. Where the record could not reasonably support a finding of guilt beyond a reasonable doubt, a conviction would deny due process. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). The trier of fact must weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. Id. In New Jersey, the de novo courts must give due though not necessarily controlling regard to the opportunity of a magistrate to view the credibility of the witnesses. State v. Johnson, 42 N.J. 146, 157 (1964).

The de novo court technically becomes the court of first instance to make findings of fact, but is somewhat constrained by the municipal court judge's credibility findings.

In the case at bar, the de novo court erred in finding Officer Flaherty's testimony more credible than the defense case because the de novo judge could not have properly weighed the evidence to draw reasonable inferences from basic facts to ultimate facts. This is partly due to the fact that the de novo court initially relied on the credibility finding of the municipal judge. (A-11). Then seven days after the conviction, the de novo court makes new and independent credibility findings. (A-2 to A-3). Inferences drawn seven days after a conviction cannot be reasonable inferences to comply with the fundamental protection of Due Process. See Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789. Drawing new inferences while already convinced of guilt beyond a reasonable doubt necessarily taints the ultimate inferences drawn because the fact finder would be presumed to be biased at that point in time. Moreover, the amplification letter states that the judge believes it is impossible for three officers to assault a person in full view of a crowd. (A-3) This too is a bias towards defendant's case which presumably existed before the trial de novo even started.

Apart from trier of fact bias, no reasonable trier of fact could find the state's case credible as it is latent with inconsistencies as found by the de novo court.[1] (A-9, A-3)

The de novo court found that the state's lone witness was stretching the truth, but still found petitioner guilty beyond a reasonable doubt. (A-9) With this many inconsistencies in the Officer's testimony, and not one single inconsistency or contradiction in petitioner's case, the de novo court abused its discretion in determining that Officer's Flaherty's testimony was more credible than the defense witnesses. The de novo court's amplification letter improperly draws the inferences of

credibility by holding, "One can hardly find it believable that three police officers, surrounded by dozens of bar-goers, would treat the defendant as testified to by the defense witnesses, handcuff him, and then assault him with a chemical spray, in full view of a crowd which would be expected to become hostile on the occurrence of such events." (A2 to A-3)

There is no evidence in the municipal court record or even in the de novo record that goes to the issue of whether the crowd became hostile. There is no evidence anywhere in the record as to how the Officers believed a crowd would react to such conduct. In fact, it very well could have been that the crowd did become hostile. The prosecution could have raised whether the crowd did not become hostile to bolster their case in the municipal court, but they did not perhaps because there was indeed some flack with the crowd. Moreover, the question of how a crowd might be expected to react, or how the Officers' thought a crowd would react was not placed in evidence which renders the de novo court's amplification letter an infringement of Due Process because the trier of fact unreasonably drew ultimate credibility facts from nonexisting facts that had no support whatsoever anywhere in the record.

Petitioner requests that this Court grant a writ of certiorari so the Court may exercise its appellate and supervisory powers.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

FRANK A. DELLE DONNE
Counsel of Record
342 Madison Avenue, Suite 1417
New York, NY 10173
(212) 599-3844

DATED: July 27, 1997

[1] 1. (T-6) Officer Flaherty indicates that he wanted to assist him in getting the hat back or whatever the problem was. Compared with (T-30) where Officer Flaherty learned of the hat while booking him. Then the Officer corrects himself in the next sentence indicating that he again heard the hat story;

2. (T-17) Officer Flaherty indicates that there was nothing else eventful at the police department, but then at T-30 Officer Flaherty seemingly fabricates that he never pursued the possible assault or theft any further because he assumed that Mr. Harris would have mentioned an assault or the bouncers would have called;

3. (T-19) Officer Flaherty refers to the report and says he saw petitioner arguing with other patrons compared to T-12 where Officer Flaherty indicates that he saw bouncers escort petitioner out. Then go back to T-19 where Officer Flaherty indicates that he saw three bouncers go back in and hold the door shut;

4. (T-26) Officer Flaherty again indicates that a theft or a problem with Mr. Harris's hat was possible when he first approached yet he later reverses and "learned of the hat at the police station". (T-30);

5. Upon reviewing T-33 to T-35, it is clear that Officer Flaherty goes back and forth as to what happened first "asking him to step away" or petitioner saying " I am going back in to get my hat." Then Officer Flaherty says he does not remember what happened first, (T-35) then he suddenly remembers, (T-35);

6. For irrefutable inconsistencies showing that Officer Flaherty was fabricating, See T-24, ln 18-22; T-27, ln 13-23; T-28, ln 19-25; and T-29, ln 1-16 where Officer.

SUPERIOR COURT-OCEAN COUNTY
CRIMINAL DIVISION-APPEALS

STATE OF NEW JERSEY : Appeal No. 149-95

VS :JUDGMENT OF CONVICTION

Ira Van Harris :
Defendant

The defendant having appealed a conviction entered by the Municipal Court of the Township of Seaside Heights on 11/16/95, and this Court having conducted a plenary trial de novo on the record, and the Court having rendered a judgment of guilty on the charge of violation 2C:33-2(A) and 2C:29-2 (W153247)

It is on this 16th day of February, 1996

ORDERED AND ADJUDGES that defendant be and is sentenced to:

Court imposed on violation of 2C:33-2(A) Fine $50, cost $30, VCCB $50 and SNF $75. Court imposed on violation of 2C:29-2 Fine $250, cost $30, VCCB $50, SNF $75. Defendant is to contact Seaside Heights Municipal Court within a week from today to make payment arrangements.

Frank A. Delle Donne, Esq.
Attorney for Defendant

/s/FRANK W. KIRKLEWSKI, JR.
DEPUTY CLERK, SUPERIOR COURT

Date: 2-20-96

/s/Peter J. Giovine, J.Cr.P.
cc: Municipal Court
Prosecutor
File

Superior Court of New Jersey

CHAMBERS OF
JUDGE PETER J. GIOVINE

OCEAN COUNTY COURT HOUSE
P.O. BOX 2191
TOMS RIVER, N.J. 08754-2191

February 6, 1996

MICHELLE Tedesco, Assistant Prosecutor
Ocean County Prosecutor's Office
Ocean County Courthouse
P.O. Box 2191
Toms River, New Jersey 08754

Frank A. Delle Donne, Esquire
342 Madison Avenue
New York, New York 10173

Re: State vs. Ira Harris
Municipal Appeal #149-95

Dear Ms. Tedesco and Mr. Delle Donne:

I am writing this letter to remind each of you that I have not heard from you regarding a sentencing date in the above matter. As I indicated at the trial de novo, I was hopeful of disposing of the sentencing within two weeks. It is important that you arrive at a date and contact me immediately through my law clerk to set up the sentencing.

I shall also take this opportunity to make a comment or two more concerning the credibility of the witnesses in this case. This letter is to be made part of any record in the event an appeal is taken by the defendant.

As indicated at the trial, credibility was central to the Court's decision. The law provides that this Court must give deference to the municipal court judge's conclusions in that regard, since he was in the best position to observe the

demeanor of the witnesses as they testified. Notwithstanding this axiom of review, this Court finds ample evidence on the record which would independently support the lower court's conclusions regarding credibility.

While this Court recognizes, as defendant alleges, certain inconsistencies in Patrolman Flaherty's testimony, the material aspects of that testimony as to how the incidents occurred are found to be truthful. On the other hand, and not mentioned by me on the record at the time that I made the decision in this matter, I do not find the testimony of the defendant and his witness to be credible. One can hardly find it believable that three police officers, surrounded by dozens of bar-goers, would treat the defendant as testified to by the defense witnesses, handcuff him, and then assault him with a chemical spray, in full view of a crowd which would be expected to become hostile on the occurrence of such events.

Kindly contact my office to immediately arrange for a sentencing date.

Very truly yours,
/s/ Peter J. Giovine
PETER J. GIOVINE, P.J.Cr.

PJG/lmh
02-06-96.ltr

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3796-95T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

IRA VAN HARRIS, JR.,

Defendant- Appellant.

Filed Dec 10, 1996
Appellate Division

Argued: November 20, 1996- Decided: Dec 10, 1996

Before Judges Long, Skillman and Cuff.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County.

Frank A. Delle Donne argued the cause for appellant (Mr. Delle Donne on the brief).

Brent D. Miller, Assistant Prosecutor, argued the cause for respondent (Daniel J. Carluccio, Ocean County Prosecutor, attorney; Thomas Cannavo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a de novo trial, defendant Ira Van Harris was convicted of the petty disorderly persons offense of improper behavior in violation of N.J.S.A. 2C:33-2a(2) and

the disorderly persons offense of resisting arrest in violation of N.J.S.A. 2C:29-2. Defendant was fined $50.00 for the improper behavior conviction and $250 for the resisting arrest conviction. Aggregate court costs of $60, VCCB penalties of $100 and SNF penalties of $150 were also imposed.

On appeal, defendant raises the following points;

I. The De Novo Court Erred By Deferring To the Municipal Court Judge On the Issue Of Witness Credibility When the Municipal Court Judge Assessed The Officer's Credibility On Evidence Inadmissible Under the Fifth Amendment.

II. The Trial Court Abused Its discretion In Determining That Officer Flaherty's Testimony Was More Credible Than The Defense Case.

After a complete review of this matter, we conclude that the arguments are without merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office

/s/ Emile R. Cox

Clerk

ORDER ON MOTION

STATE OF NEW JERSEY
VS

IRA VAN HARRIS

SUPERIOR COURT OF NEW-JERSEY
APPELLATE DIVISION
DOCKET NO. A-003796-95T3
MOTION NO. M-002675-96
BEFORE PART: A
JUDGE(S): LONG
SKILLMAN
CUFF

MOTION FILED: DECEMBER 20,1996 BY:IRA VANHARRIS
ANSWER(S) FILED:

REC'D
Appellate Division
January 10, 1997
/s/ Emile R. Cox, Clerk

SUBMITTED TO COURT: JANUARY 08, 1997

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 9 DAY OF January, 1997 HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED
MOTION BY APPELLANT - FOR RECONSIDERATION SUPPLEMENTAL:	( )	(X)

I hereby certify that the foregoing is a true copy of the original on file in my office. /s/ Emile R. Cox, Clerk

/s/ VIRGINIA LONG P.J.A.D.

SUPREME COURT OF NEW JERSEY
C-953 September Term 1996
43,599

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v. ON PETITION FOR CERTIFICATION

IRA VAN HARRIS,

Defendant-Petitioner.

FILED
APR 29 1997
/s/ Stephen Townsend
Clerk

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3796-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the honorable Deborah T. Poritz, Chief Justice, at Trenton, this 28th day of April, 1997.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
/s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY- CRIMINAL DIVISION
MUNICIPAL APPEAL NO. 149-95
A.D. #_____

STATE OF NEW JERSEY,)

-v-) Transcript
of
IRA VAN HARRIS) Municipal Appeal
Proceedings
Defendant)

Place: Ocean County Courthouse
118 Washington Street
Toms River, N.J. 08753

Date: January 31, 1996

BEFORE:
HON. PETER J. GIOVINE, J.S.C.
TRANSCRIPT ORDERED BY:
FRANK A. DELLE DONNE, ESQ.,
342 Madison Avenue, Suite1417
New York, NY 10173
APPEARANCES:
MICHELLE TEDESCO, ESQ.,
Assistant prosecutor for the County of Ocean,
Attorney for the State.

FRANK A. DELLE DONNE, ESQ.,
Attorney for the Defendant.

DAYETTE J ZAMPOLIN, C.S.R.
Official Court Reporter
Ocean County Courthouse
118 Washington Street
Toms River, N.J. 08753

(Page 24; de novo court findings)

THE COURT: Okay. This Court has sat as the trier of fact in, I guess at this point, thousands of cases in Municipal Court, and here as the trier of fact with regards to motions to suppress, where you hear witnesses. And there are cases where, and I've stated it many times, there are cases where, when you hear somebody say something that you know, based upon common sense, itself, is an untruth.

And there are times in the coarse of certain proceedings where the Court concludes that falsus in uno, falsus in omnibus is an appropriate axiom to apply.

If he would lie about this, then I really am curious enough and shaky enough about his credibility on other issues that I should throw all the testimony out.

By the same token, I can - I can say here and, unequivocally, that I've heard dozens and dozens of cases - where not only where there are inaccuracies stated, but where a witness, sometimes an officer, has stretched the truth on a particular issue, but where the Court is still basically satisfied, based upon a reading of all the testimony, that the substance of the charges was truthfully testified to.

And unfortunately for you and your client, that's the conclusion that I reach here.

There are inconsistencies with regard to what the officer had to say. There's no question with regard to that. But I find that basically, he was ejected from the club in the manner that the officers testified to.

They went over to prevent a situation from becoming worse,

and just tell him "look, move on, and keep your voice down," and so on, and so forth. And he rejected their suggestions in that regard.

And he, in fact, the Court finds, did engage in the behavior, really, which did violate 2C:33-2b..

It really did create, so far as this Court was concerned, a physically dangerous condition, or alternatively, was involved in tumultuous behavior.

I don't think initially the purpose was to cause public inconvenience, annoyance or alarm. And I think that's the most important aspect or the most important element of the offense, by the way.

I think he wanted to get his hat back, but I think because of the situation, he just became so persistent, and it got to a point where I'm sure he realized, as well, that he now is engaging in behavior, the purpose of which really was to create and to call attention to the situation.

These police officers were, under those circumstances, with his not following directions, in a position to make an arrest at that time.

And I find that he didn't comply with his orders- their orders, and that he did, in fact, violate the Statute dealing with resisting arrest of a disorderly person's nature.

Irrespective of the inconsistencies which you properly point out, it's clear that you went through each and every line of the testimony.

The Court should grant, irrespective of and, and I should

say, totally aside from anything that the Judge had to say with regard to Complaints being filed or not being filed, that, I agree with you, that doesn't cut any mustard, so far as I'm concerned, but he did have the opportunity to view, as the Court did not, the testimony given by all of the parties.

And I'm entitled to and really bound to give that testimony deference under this case of State versus Johnson, which has been a law in this state for up to 25 or 30 years.

This Court does not stretch to make findings.

As the Municipal Court Judge, I did that once, after sitting about four months, and I found the defendant guilty, and wound up calling him back the same evening, because I was struggling with myself with regard to a certain aspect of it.

And I concluded that I must have had a reasonable doubt, and I consider myself a reasonable person. And I turned around and entered a plea of not guilty.

I'm satisfied here beyond a reasonable doubt that he engaged in that conduct.

His motive, initially, may have been a reasonable one. He didn't go about it the right way.

And he could have said: "my hat's inside," in a very calm fashion.

I don't find that that was the case. It got worse and worse and worse.

They were trying to get him away from the club. If he had been calm about it, maybe by the time they walked him a certain distance away, he could have calmly discussed it

with them, and the officer could have gone back and said, "Did the guy leave his hat here?" And so on, and so forth.

But there was a type of behavior that he entered into.

So I'm entering findings of guilt with regard to each of the two charges as they're set forth in the Complaint.

And obviously, he was found not guilty with regard to the other charge. That's not before me.

WEST'S NEW JERSEY COURT RULES
PART II. RULES GOVERNING APPELLATE PRACTICE IN THE SUPREME COURT AND THE APPELLATE DIVISION OF THE SUPERIOR COURT

COURT
RULE 2:5. HOW TO APPEAL
Current with amendments received through 3-1-95

2:5-1. Notice of Appeal; Order in Lieu Thereof; Case Information Statement

. . .

(b) Notice to Trial Judge or Agency. In addition to the filing of the notice of appeal the appellant shall mail a copy thereof, with a copy of the Case Information Statement annexed, by ordinary mail to the trial judge. If the appeal is taken directly from the decision or action of an administrative agency or officer, the appellant shall mail a copy of the notice of appeal, with a copy of the Case Information Statement annexed, to the agency or officer, except that if the appeal is taken from the Division of Workers' Compensation, a copy of the notice of appeal shall also be sent to the Workers' Compensation judge who decided the matter. Within 15 days thereafter, the trial judge, agency or officer, may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2. If there is no such prior statement, opinion or memorandum, the trial judge, agency or officer shall within such time file with the Clerk of the Appellate Division and mail to the parties a written opinion stating findings of fact and conclusions of law. The appellate court shall have jurisdiction of the appeal notwithstanding a failure to give notice to the trial judge, agency or officer, as required by this rule.

WEST'S NEW JERSEY COURT RULES
PART III. RULES GOVERNING CRIMINAL PRACTICE
CHAPTER V. APPEALS FROM COURTS OF LIMITED CRIMINAL JURISDICTION

RULE 3:23. APPEALS FROM JUDGMENTS OF CONVICTION IN COURTS OF LIMITED CRIMINAL JURISDICTION

Current with amendments received through 3-1-95

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to R. 7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The court shall provide the municipal court with reasons for the remand. The court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is

found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.

(b) Briefs. Briefs shall be required only if questions of law are involved on the appeal or if ordered by the court and shall be filed and served prior to the date fixed for hearing or such other date as the court fixes.

*792 (c) Waiver; Exception. The appeal shall operate as a waiver of all defects in the record including any defect in, or the absence of, any process or charge laid in the complaint, and as a consent that the court may, during or before the hearing of the appeal, amend the complaint by making the charge more specific, definite or certain, or in any other manner, including the substitution of any charge growing out of the act or acts complained of or the surrounding circumstances of which the court from whose judgment or sentence the appeal is taken had jurisdiction, except that if the appeal is from a conviction for an indictable offense, the appeal shall not operate as a consent that the complaint may be amended so as to charge such an offense or a new or different indictable offense, unless the defendant agrees to such amendment.

(d) Defenses Which Must Be Raised Before Trial. The defenses of double jeopardy, lack of jurisdiction in the court, failure of the complaint to charge an offense, the unconstitutionality of the statute, regulation promulgated pursuant to statute or ordinance under which the complaint is made and all other defenses and objections based on defects in the institution of the prosecution or in the

complaint must be raised by motion and determined in accordance with R. 3:10.

(e) Disposition by Superior Court, Law Division. If the defendant is convicted, the court shall impose sentence as provided by law. If the defendant is acquitted, the court shall order the defendant discharged, the conviction in the court below set aside, and the return of all fines and costs paid by the defendant. An appropriate judgment shall be entered and a copy thereof transmitted to the court below.

(f) Appearance by Prosecuting Attorney. The prosecuting attorney shall appear and act on behalf of the respondent at the hearing.

NEW JERSEY STATUTES ANNOTATED
TITLE 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE
SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES
PART 4. OFFENSES AGAINST PUBLIC ADMINISTRATION

CHAPTER 29. OBSTRUCTING GOVERNMENTAL OPERATIONS: ESCAPES

Current through L.1994, c. 191 (end of laws), approved 12/29/94

2C:29-2. Resisting arrest; eluding officer

a. A person is guilty of a disorderly persons offense if he purposely prevents a law enforcement officer from effecting a lawful arrest, except that he is guilty of a crime of the fourth degree if he:

1. Uses or threatens to use physical force or violence against the law enforcement officer or another; or

2. Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance.

NEW JERSEY STATUTES ANNOTATED
TITLE 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE
SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES
PART 5. OFFENSES AGAINST PUBLIC ORDER, HEALTH AND DECENCY
CHAPTER 33. RIOT, DISORDERLY CONDUCT, AND RELATED OFFENSES

2C:33-2. Disorderly conduct

a. Improper behavior. A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he

(1) Engages in fighting or threatening, or in violent or tumultuous behavior; or

(2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

b. Offensive language. A person is guilty of a petty disorderly persons offense if, in a public place, and with purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing, he addresses unreasonably loud and offensively coarse or abusive language, given the circumstances of the person present and the setting of the utterance, to any person present.

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.